STATE OF NEW YORK
PUBLIC SERVICE COMMISSION
COMMISSION ON CABLE TELEVISION

CASE 26494 - In the Matter of the petition of New York State Cable Television Association for investigation of pole attachment and related agreements between utilities and CATV systems in New York.

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CASE 26494 - In the Matter of the petition of New York State Cable Television Association for investigation of pole attachment and related agreements between utilities and CATV systems in New York.

RECOMMENDED DECISION TO THE
PUBLIC SERVICE COMMISSION 1/

APPEARANCES:

Cohen & Berfield (by Lewis I. Cohen and Lew A. Millenbach, Esqs.), 41 State Street, Albany, N. Y., for the New York State Cable Television Association.

Howard Read, Arthur Perry Bruder, Esqs., Empire State Plaza, Albany, N. Y., Arthur B. Cohn, Esq., Two World Trade Center, New York, N. Y., for the Staff of the Public Service Commission.

Keith J. Roland, James H. Sweeny, Joel A. Linsider and John Grow, Esqs., Tower Building, Empire State Plaza, Albany, N. Y., for the New York State Commission on Cable Television.

Edward L. Friedman, Mark D. Luftig, and Keith E. McClintock, Jr., Esqs., 1095 Sixth Avenue, New York, N. Y., for the New York Telephone Company.

Adalbert K. Wnorowski, Esq., 850 Harrison Street Extension, Johnstown, N. Y., for General Telephone Company of Upstate New York.

1/ In their respective Orders of Investigation, the Public Service Commission directed the Presiding Examiner to issue a Recommended Decision while the Commission on Cable Television directed the Examiner to certify the record. The record is hereby certified to the Commission on Cable Television.

Nixon, Hargrave, Devans & Doyle (by Michael T. Tomaino, David J. Cook, and Michael R. Wolford, Esqs.), Lincoln First Tower, Rochester, N. Y., for the Rochester Telephone Corporation.

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THOMAS R. MATIAS, Examiner:

INTRODUCTION

Background

By a Petition for Investigation dated March 26, 1973, the New York State Cable Television Association (Association/Petitioner) requested the New York State Commission on Cable Television (CCTV) to undertake an investigation of a number of complaints pertaining to pole attachment and related agreements between utility companies and Community Antennae Television Systems (CATV). In that petition the Association made a number of allegations concerning contract terms and provisions as well as the policies and practices pursued by the utilities. The Petitioner observed that, in view of precedent, the New York State Public Service Commission (PSC/Commission) was not likely to assume jurisdiction with respect to pole attachment and related agreements between the utilities and CATV. The Association, therefore, sought to invoke jurisdiction by the CCTV.

By a notice dated April 20, 1973, counsel for the CCTV requested comments from several major utilities and the PSC with respect to the Petition for Investigation. Responses were to be

filed by May 10, 1973; several utilities filed statements opposing the Petition for Investigation. Responding to the notice were: New York Telephone Company (NYT/Company), the Niagara Mohawk Power Corporation (Niagara Mohawk), Central Hudson Gas and Electric Corporation (Central Hudson), the Consolidated Edison Company of New York, Inc. (Consolidated Edison), and the General Telephone Company of Upstate New York (General Telephone). Comments were also filed by the PSC. On June 25, 1973, the Association filed a reply and a further pleading was filed on August 15, 1973 (Supplement to Petition for Investigation) informing CCTV that the Federal Communications Commission (FCC) had initiated a pole attachment proceeding, Dockets 16928, 16943 and 17098, which was the subject of a public notice dated August 3, 1973. On July 8, 1976, the FCC dismissed that proceeding citing a lack of jurisdiction over non-telephone utility poles.

After a review of the Petition and responses thereto, it was decided that both commissions had an interest in the subject matter and that each would conduct an investigation into the practices of utilities relating to pole attachment and related agreements.[2/] It was further decided that the investigations so ordered would proceed on a common record to be heard by a single Hearing Examiner. The PSC's Order of Investigation was issued on

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2/ The CCTV's order included the practices of municipalities. A complaint had been received from Peoples Cable Corporation against the Fairport Municipal Commission alleging refusal to grant access to utility poles in the Town of Perinton. By a letter dated September 30, 1975, and addressed to the Presiding Examiner, Peoples withdrew its complaint.

September 3, 1973, and on September 14, 1973 CCTV issued its order. Both commissions indicated a desire to consider the specific complaints alleged, but both indicated a further desire to initiate a broad fact-finding investigation. Both acknowledged the presence of jurisdictional questions regarding their respective authority to decide the issues on the merits.

A prehearing conference was held on October 23, 1973. In addition to the Association and those utilities who filed comments on the Petition for Investigation, appearances were entered by, inter alia, the Staff of the Public Service Commission (Staff), counsel for CCTV, the New York State Electric & Gas Corporation (NYSEG), Orange and Rockland Utilities, Inc. (Orange & Rockland), the Rochester Telephone Corporation (RTC), Rochester Gas and Electric Corporation (RG&E), the Long Island Lighting Company (LILCO), and the Midstate, Delhi, Ausable Valley, Deposit and Highland telephone companies. The first hearing began on December 18, 1973 and hearings continued on a regular basis until April 18, 1974. Further hearings were suspended while the parties entered into a series of negotiations. Hearings resumed on December 10, 1974 and continued until October 8, 1975 when the record was closed. There were 32 days of hearing taken on 4,878 pages of transcript with 120 exhibits being received into evidence. Fourteen witnesses were heard.[3/]

3/ The Staff, NYT and Niagara Mohawk presented one witness each; the Association presented testimony through 11 witnesses. The attached Appendix gives a list of witnesses along with a brief summary of the areas in which each offered testimony.

The briefing stage of this proceeding has been substantial. At the close of cross-examination of the Association's direct case, the Presiding Examiner directed the parties to file separate briefs with respect to jurisdiction. Opening briefs on jurisdiction were filed on March 7, 1975; reply briefs were filed on April 21, 1975. After the record was closed, the Association filed the first brief on substantive issues (December 31, 1975). Answering briefs were filed b the Staff and the utilities on March 15, 1976, and all parties filed reply briefs on April 30, 1976.[4/] On June 7, 1976 the Association fi a supplement to its reply brief.[5/] Responses to the Petitioner's supplement were filed by Niagara Mohawk on June 10, 1976 and by NYT on June 21, 1976.

Procedural Background

Jurisdiction was the subject of considerable discussion among the parties during the course of the prehearing conference on October 23, 1973. It was concluded that this issue should be addressed by brief after the completion of cross-examination on the Association's direct case. It was deemed important to have the parties brief this question at an early date because the opportunity to fully review and assess the positions of the parties would be

4/ The Staff filed briefs in this proceeding although counsel for CCTV did not.

5/ The Association also requested leave to file the supplement; leave is hereby granted.

helpful in conducting hearings on the substantive issues of the proceeding. Because jurisdiction is a critical threshold issue and because the parties were briefing this question at an early date, it was acknowledged that it would be appropriate to issue an early Recommended Decision on jurisdiction alone. Before the hearings were closed the opinions of the parties with respect to an early decision on jurisdiction were solicited. The consensus was, in effect, that jurisdiction and substantive issues should be treated within one Recommended Decision. Accordingly, therefore, jurisdiction is treated as a separate subject below.

The complaints that were discussed by Association witnesses during the course of its direct case were directed toward NYT and to a much lesser extent Niagara Mohawk.[6/] The agreements, practices or policies of other utilities were not raised except through the course of cross-examination and no complaints were made in that context. With the Petitioner's case having been so limited, Central Hudson (on August 12, 1974) filed a motion requesting that it be dismissed as a party to the proceeding. Several other utilities subsequently joined in Central Hudson's motion and all parties were given an opportunity to file comments. All of these motions were denied by a ruling issued on November 25, 1974. The basis of denial was, in effect, that the PSC and CCTV had contemplated an investigation somewhat broader than the mere assessment of those specific allegations raised in the Association's Petition for Investigation. It was concluded that the participation of all utility parties would be required to fully develop the record as intended.

6/ One CATV witness directed complaints against RTC, however, these complaints were not pursued further. This matter is briefly discussed in the Appendix.

A degree of controversy arose upon the submission of testimony sponsored by the Staff which, in part, took the form of several recommendations which would materially affect the future relationship between utilities and CATV operators if adopted. A number of objections and motions were made with respect to that testimony both before and after cross-examination. Essentially, the objecting utilities pointed to the fact that this proceeding was initiated in order to evaluate a number of complaints raised by the Petitioner but that the Staff testimony had the effect of proposing rules. It was argued that since this is a complaint proceeding, it is not the type of proceeding from which rules can emanate. Recognizing the obvious merit in the arguments so raised, the Examiner nevertheless found the Staff testimony both material and relevant. This conclusion was based, in part, on the fact that this proceeding contained the ingredients of a fact-finding investigation, and that the Orders of Investigation made it clear, through their tenor, that more was contemplated than the simple assessment of the specific allegations raised in the Petition for Investigation. The ruling, which was dated May 23, 1975, noted, in part, "It is perfectly appropriate, however, for the Commission to look to this record for insight through the views of the Staff and other parties as to matters that may form the basis of future actions or proposals."

In its original Petition for Investigation, the Association had complained with respect to the level of pole attachment rentals. This complaint was not pursued by the Petitioner, but NYT sought to introduce testimony relating to the appropriate level of pole rentals. A motion to strike this testimony was sustained on the record for the reason that this proceeding centered on utility practices and policies as well as the resolution of jurisdictional issues.7/ It was concluded that while the appropriate pole rental rate may be a relevant inquiry, it was also a highly complex one that would necessitate several more hearings and would, therefore, best be resolved in the context of a future hearing assuming jurisdiction was found. NYT took an appeal from that ruling which is still pending before the PSC.

Evidentiary progress in this proceeding was delayed by the fact that the parties had entered into a series of negotiations with a view to resolving their differences. At a prehearing conference held on June 13, 1974, it was reported that there had been several meetings between the representatives of the Association, NYT, and the other utilities. Counsel for the Petitioner reported that issues surrounding the buried agreement had been resolved as between the Association and NYT, but that differences remained with respect to the pole attachment agreement and the underground agreement. The parties indicated their intention to continue negotiations; hearings were suspended to permit that procedure to resume. A further prehearing conference was held on July 31, 1974 at which time it was reported that issues were not resolved with respect to the pole

7/ The testimony remained in the record, but under limitation.

attachment and underground agreements, but that negotiations should continue. It was felt that if agreement had not been reached by September, further negotiations would be fruitless. Accordingly, another prehearing conference was held on September 20, 1974 when it was reported that the parties were unable to resolve their differences; it was requested that dates be set for the utilities' direct case. After discussing other procedural matters, plans were made to move forward with the taking of evidence.

THE RELATIONSHIP BETWEEN THE UTILITIES AND CATV

Estimates vary as to the exact date of inception of CATV in New York State, but its utility appears to have been apparent by 1950. Very basically, CATV is the means by which weak or distant television signals can be made available at households or other locations where such signals could not be received (or adequately received) through antennas located at the premises. Operating in a service territory similar to that associated with telephone electric utilities, the CATV operator serves subscribers through "drops" running from a communications cable. Subscribers normally pay an attachment fee plus a monthly rental for this service. Today, the service provided by CATV operators includes programs broadcast locally as well as the selection of distant signals, i.e., certain New York City television programs furnished to CATV subscribers in the Albany area, and channels carrying unique or special interest programs not available from local broadcasters.

Because its distribution network requires rights-of-way like those used by both telephone and electric utilities, CATV has found access to those rights-of-way and the license to use facilities already existing on those rights-of-way to be particularly convenient. In this connection, CATV operators have entered into certain agreements by which they share space with the utilities. Under the buried agreements CATV may share a trench; under underground agreements it may share conduit space; and under pole attachment agreements it may share poles that are owned by the telephone utilities or the electric utilities or under common or joint ownership of both.

In its Petition for Investigation the Association reported that at that time (March, 1973) there were approximately 458 CATV systems in New York State having pole attachment agreements with utilities, and that most of these had agreements with more than one utility.8/ NYT is the dominant utility with respect to CATV pole attachments. By 1974, NYT had entered into 122 pole attachment agreements with CATV operators involving more than 265,000 poles. Niagara Mohawk has entered into 42 agreements. NYT undertakes licensing on poles owned by it or jointly owned with electric utilities. Licensing is generally undertaken by electric companies only with respect to solely-owned poles.

8/ The Association, however, has a membership of only 76 CATV systems.

By a very substantial margin, the emphasis in this proceeding has been on pole attachment agreements and particularly those executed between CATV operators and NYT. Some discussion of the procedures involved in attaching to poles is appropriate.

After a CATV operator has entered into a pole attachment agreement, requests are made of the utility for licenses to attach to specific poles. In an application to NYT for a license, the CATV operator lists the poles to which attachment is desired, the number of each pole, its location and the franchising municipality. NYT verifies the information in the application and a determination is made of who owns the poles. NYT also initiates a customer work order (CWO) upon which is recorded the time spent on survey and makeready work.

In the case of NYT, the survey is generally done by its own field personnel. A survey is a procedure of "walking the poles" in order to determine what work must be done on the poles in order to accommodate the additional attachment.

All poles to which attachment is sought do not require makeready work, but when that work is performed it is done to rearrange those facilities already existing on the pole in order that the new attachment may be made safely and in conformance with the National Electrical Safety Code which appears as Appendix 2 in the NYT pole attachment agreement.[9/] That code, among other things,

9/ Admitted into evidence as Exhibit 17A in this proceeding was the Bell System Manual of Construction Procedures which sets forth a number of specifications with regard to attachments.

provides for the clearances that must be established and maintained between different facilities. The purpose for clearance is to ensure that the different facilities do not come in contact with each other to cause service interference and hazardous voltage levels. In arranging facilities, electric facilities generally occupy the top of the pole and telephone and CATV facilities occupy lower portions at specified intervals. If the pole in question cannot accommodate the new attachment, it may be necessary to "change-out" that pole. This procedure is simply the replacement of the existing pole with a new, higher pole that will accommodate all attachments without violation. In addition to rearrangements, makeready work may involve additional guying and anchoring if it appears that the additional facility would create such stress as to require further support for the pole. If the pole itself does not have the strength to sustain the additional burden, it is changed-out. Makeready work is sometimes performed after the CATV attachment is made. If utility requirements change, for example, all existing attachments (including the CATV attachment) may have to be rearranged in order to meet those changed conditions.

CATV companies are incorporated under Article 3 of the Transportation Corporations Law which provides them with "utility-like" status for some purposes. For example, corporations qualifying under Article 3 have the right of condemnation (§27). Regardless of this legal advantage, CCTV operators appear to have encountered problems obtaining easements to use existing right-of-way. It further appears

that private property owners have not always been inclined to extend to CATV rights similar to those already enjoyed by the telephone and electric utilities. The Examiner gathers that CATV wishes to avoid condemnation proceedings in preference to sharing easements already held by the utilities. In this connection, several of the parties cited the case of Hoffman v. Capital Cablevision Systems, Inc., 82 Misc. 2d 986 (Supreme Court, Albany County, 1975). In that case suit was brought by private property owners seeking to restrain the defendant CATV company from using poles already located on their property to which NYT and Niagara Mohawk facilities were attached. It was contended that the CATV attachment created an additional burden on the property which required the payment of reasonable compensation to the plaintiffs. The Court quoted from the easement granted to NYT and Niagara Mohawk and then stated that the essential inquiry was whether CATV's intended use fell within or without the scope of the existing easement. If it did, then NYT and Niagara Mohawk alone could grant CATV the right to use the right-of-way. The Court noted that the defendant provided a public service imbued with public interest, that it was regulated pursuant to Article 28 of the Executive Law, and incorporated under Article 3 of the Transportation Corporations Law. The Court stated that it was impossible to conclude, therefore, that the services provided by the defendant burdened or exceeded the existing easement or interfered with the property of the plaintiffs anymore than NYT or Niagara Mohawk already had done. The Court concluded, after reviewing the

terms of the easement, that the burden was no greater than the original grant, and that the grantee utilities could apportion the easement so as to accommodate the defendant.

This case was appealed to the Third Department and on May 27, 1976, after briefs in this proceeding had been filed, the Appellate Division released its decision (— App. Div. 2d —) affirming the lower court's opinion. The easement dispute between the Petitioner and the utilities will be discussed in the section on substantive issues.

JURISDICTION

Jurisdiction of the PSC

Position of the Parties

The several utility parties who responded to the invitation to submit briefs on the question of jurisdiction argued that pole attachment and related agreements between the utilities on one hand and CATV companies on the other are not a part of the public service performed by regulated companies and, therefore, are not subject to the jurisdiction of the PSC. It was further argued that the PSC can exercise only those powers specifically conferred by statute, and that a non-utility activity, such as the rental of pole or conduit space, is not an activity over which the PSC may properly assert jurisdiction. Many of the utilities argued that there is no legitimate area of regulatory concern for the PSC with respect to the subject agreements; others argued that the PSC is limited to an

investigatory role. At least one utility took the position that the PSC could exercise jurisdiction only when the use of utility property by CATV companies resulted or was likely to result in the deterioration or impairment of jurisdictional services. At least one other utility argued that the PSC could exercise jurisdiction over non-utility services in order to protect the utility ratepayers, and to ensure that such services are offered on a non-discriminatory basis.

In their briefs, the utilities presented extensive discussions of appropriate statutory provisions as well as decisional precedent. Cited and discussed in all briefs was the case of Ceracche Corp. v. Public Service Commission, 267 N.Y.S. 2d 969 (Supreme Court, Special Term, Albany County, 1960). That opinion will be discussed later in this report.

The Staff has argued that the various provisions of pole attachment and related agreements have an impact on the services and rates of utilities. The large number of CATV attachments results in a degree of work and expense on the part of the utilities. The Staff has argued that utility ratepayers have a direct interest in the relationship between CATV companies and the utility; it is proper and necessary, therefore, for the PSC to supervise this relationship. The Staff further argued that the PSC has ample statutory authority to assure that agreements are consistent with public service obligations, that the rights of utility subscribers are fully protected and to

assure that the maximum use will be made of utility facilities so that the cost of those facilities may be reduced to utility subscribers. The Staff has also argued that the PSC has the authority to assure that there is no discrimination among CATV companies as a result of terms and conditions appearing in pole attachment and related agreements.

The Petitioner made its arguments with respect to the PSC's jurisdiction by way of reply brief. In that brief, the Association concurred with the position asserted by the Staff in its initial brief on jurisdiction. In addition, the Petitioner argued that the PSC could not ignore the provisions of Article 28 of the Executive Law even in the absence of a specific jurisdictional grant in the Public Service Law. It was argued that Article 28 vests the PSC with power to ensure that operations carried out under the Public Service Law do not frustrate legislative policies as set forth in Article 28. In this connection, the Association noted that the monopolistic position of the utilities makes it particularly imperative that the PSC take affirmative action with respect to jurisdiction. Because the utilities are the only right-of-way companies having pole and conduit plant, they are in a position to frustrate the goals and policies enunciated by the Legislature in Article 28 of the Executive Law. Relying on the case of McLean Trucking v. United States, 321 U.S. 67 (1943), the Association argued that the PSC cannot ignore policies set forth in other statutes.

Discussion

The PSC's jurisdictional powers over electric utilities are set forth in Article 4 (Sections 64 through 77) of the Public Service Law, and its jurisdiction over telephone utilities is set forth in Article 5 (Sections 90 through 103). The original Public Service Law was enacted early in this century, and there have been a number of decisions, both by the PSC and by the courts, interpreting jurisdictional grants appearing in the statute. Of particular relevance to this discussion, however, are those decisions rendered in the last two and one-half decades as CATV was developing. Many of these cases have been cited in the briefs filed by the parties to this proceeding. In order to establish the PSC's jurisdictional parameters, some discussion of these cases is necessary.

A case which did not involve a CATV company but was instrumental in guiding the PSC's view of its jurisdiction with respect to such companies was Matter of Solomon v. Public Service Commission, 286 App. Div. 636 (Third Dept. 1955). The petitioners therein had filed a complaint against NYT charging that, through gross negligence, the Company had failed to include in its classified telephone directory an advertisement for the petitioner's business. The PSC declined to take jurisdiction over the complaint and, pursuant to Article 78 of the Civil Practice Act, relief was pursued in court. In pertinent part, the Appellate Division stated as follows:

"The listings in advertisements in the classified directory do not constitute service over the line of the telephone company. There is therefore no statutory duty on the part of the telephone company to file a schedule or tariff covering such listings and advertisements and there is no statutory obligations on the part of the Public Service Commission to compel the telephone company to file such a schedule or tariff.

"It appears that in the exercise of its general regulatory powers (citations), the commission has heretofore taken jurisdiction over charges for lightface listings in the classified directory and that, pursuant to its direction, the telephone company has filed a tariff with respect to such listings (citations). The availability of such listings to all customers on equal terms and at reasonable rates obviously relates to the adequacy and reasonableness of the telephone service. If the telephone company publishes a classified directory for use by the public, the listing therein of a particular customer or associates of a customer becomes an important part of the telephone service (citations). However, once a lightface listing has been provided, the substitution of boldface type in the listing or the insertion of a display advertisement in the directory, is simply a matter of advertising, similar in some respects to advertising in other media. But the fact that the advertisement appears in a classified telephone directory makes it subject, at least to a limited extent, to the jurisdiction of the Public Service Commission. ... Furthermore if advertising space is not offered to all subscribers on equal terms, serious competitive disadvantage may result. The Public Service Commission therefore has the responsibility of seeing to it that advertising in the classified directory is set up in a manner which does not unduly interfere with the use of the ordinary listings and that the privilege of inserting advertisements is available to all subscribers upon the same terms and conditions, without discrimination. (emphasis supplied)

> "However, it does not follow that all aspects of classified directory advertising, including rates and contract forms, are matters of concern to the commission. The commission's interest in the charges for directory advertising is of a very different nature from its interest in the rates charged for telephone service. While the advertising revenues are properly treated as a part of the telephone company's utility revenues (citation), the commission's primary concern in this connection is to see to it that the telephone company obtains the maximum revenue which it can reasonably obtain from its advertising operations so that the amount of revenue to be obtained from subscribers for telephone service may be reduced as much as possible."

Reference by the Solomon Court to the PSC's exercise of "limited jurisdiction" appears to have had an impact when the Commission considered an early case involving the relationship between utilities and CATV companies. The case of Antenna Systems Corporation v. New York Telephone Company, 25 PUR 3d 316 (1958) involved a situation where a CATV company alleged discrimination because of the refusal of NYT to permit attachments to poles located in the Village of Massena. After citing statutory references to its jurisdiction, the PSC, in the course of its opinion, stated:

> "While these provisions give us broad powers, we do not construe them to give us authority to require the telephone company to use its poles for purposes foreign to telephone service as, for example, require the company to lease its poles for advertising purposes. We think that the intent of the statute was to give us jurisdiction over the physical plant of the telephone company to the extent that we could see to it that safe and adequate telephone service was rendered. Of course, the improvident

> use or failure to make reasonable use of its plant might be of consideration in a rate case; but we believe that the intent of the statute was not to give us power to overrule the ordinary business judgment of the company respecting other than telephone activities."

After taking note of the complainant's contention that discrimination resulted when NYT did not grant to it the pole attachment rights it had granted to others the Commission stated:

> "That proposition does not necessarily follow. Section 91 of the statute, sub-paragraph 3 dealing with discrimination, only applies to the utility portion of its business. If the company engages in a nonutility function ..., we would have no control over such activity and it could discriminate or not as it saw fit, provided always that it might be answerable for its action in a rate proceeding."

However, the Commission went on to say:

> "There are borderline situations in which it has been held that, while the company might not be under obligation to engage in a certain activity, having voluntarily done so, while our jurisdiction may be limited, either by reason of the impact of the activity upon rates or by reason of its correlation with telephone activity, we can exert some control." (Citing Solomon and other cases).

The PSC, therefore, concluded that a discrimination existed, and it had jurisdiction to cure that discrimination. The rationale of this conclusion was that the furnishing of a service of the type considered was a link in the expanding art to which NYT was basically

engaged. In other words, the PSC relied on its jurisdiction to regulate similar activities if they were engaged in by telephone companies as an adjunct of their normal operations.

Another case having an impact on considerations of the PSC's jurisdiction with respect to CATV was the case of Matter of National Merchandising Corp. v. Public Service Commission, 5 N.Y. 2d 485 (1959) Therein the Court of Appeals considered a PSC approved telephone company tariff that restricted the use of subscriber-provided binders or holders for telephone directories. The Appellant in that case distributed to telephone subscribers a clear plastic directory cover to which was attached a single opaque sheet containing the advertisements of local merchants together with their telephone number as well as several emergency numbers for the locality. At the outset of its discussion, the Court stated, "The repository of the Commission's regulatory authority is the Public Service Law, and the Commission is powerless to exceed the authority conferred on it by that statute." Citing the Solomon case, the Court went on to state:

> "The commission may not posit its jurisdiction upon the possible impact of these covers on advertising revenues. It is one thing to have limited jurisdiction over advertisements in the directory to see that all advertisers are treated equitably, and to insure that maximum revenues are derived from the sale of advertisements (citing Solomon); it is quite another thing to assert jurisdiction to immunize these telephone companies from competition, where the telephone companies engage in activities which do not come within the scope of an essential public service."

* * *

> "We conclude, therefore, that the commission lacks authority to prohibit, either directly or indirectly, a lawful business enterprise from competing with the telephone companies in non-public service areas (citations)."

On May 12, 1959, the Commission issued its decision in Case 19616 - Complaint of Ceracche Television Corporation Against New York Telephone Company as to Rates and Practices Under a Pole Attachment Contract Between Said Companies. In dismissing the complaint for lack of jurisdiction, the Commission stated:

> "Basically, the rental by this Company of space on its telephone poles is not a telephone or other utility service. The Commission's jurisdiction over collateral activities or the rendition of collateral services by a utility is limited, and the scope of that jurisdiction was outlined by Justice Halpern in his opinion in Matter of Solomon v. Public Service Commission, 286 App. Div. 636 (3d Dept. 1955). It extends no further than the prevention of discrimination and to insure that the revenues reasonably obtainable from such activities are utilized for the benefit of all of the Telephone Company's subscribers."

The complainant's petition to reopen Case 19616 was denied by the PSC in a ruling issued on June 9, 1959, and, thereafter, the complainant initiated a proceeding under Article 78 of the Civil Practice Act before the Supreme Court, Special Term, Albany County, Ceracche Television Corp. v. Public Service Commission, supra. In this case the petitioner and NYT were parties to a contract which, in pertinent part, specified pole rentals and limited the petitioner to the transmission of standard off-the-air broadcasts. Subsequently,

NYT extended permission to the petitioner to carry locally produced programs; that permission was later withdrawn. At approximately the same time, NYT raised its pole rentals to the petitioner. In the Article 78 proceeding, the petitioner sought to compel the PSC to assume sufficient jurisdiction to order the filing of tariffs and to otherwise regulate the relationship between the petitioner and NYT. Citing both National Merchandising and Solomon, the Court pointed out that the jurisdiction of the Commission is strictly limited by statute, and unless the power of regulation is granted by the Public Service Law, the PSC is without jurisdiction. In pertinent part, the Court further stated:

> "The petitioner relies strongly on the commission's decision in the case of Complaint of Antenna System Corporation v. New York Telephone Company, P.S.C. #19001. That case involved the adoption by the commission of the so-called 'limited' jurisdiction theory as evolved by the decision of Matter of Solomon v. Public Service Commission, supra. It also antedated the later decision of the courts clarifying the extent of the 'limited' jurisdiction theory (citing National Merchandising). This court does not therefore consider the Antenna Systems case as determinative of the legal issues with which the court is concerned on this application.
>
> "The rental of the pole space by the company to the petitioner is not part of the public service performed by the company in the business of telephonic communication (citations). Such a non-utility activity of a telephone company is not subject to regulation by the Commission (citing Solomon and National Merchandising)."